83-2065

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER 1983

ROLAND A. JONES,

PETITIONER,

v.

DEPARTMENT OF HUMAN RESOURCES (DHR), STATE OF GEORGIA, et al.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROLAND A. JONES
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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A MEMBER OF THE PROTECTED GROUP IS STILL PROTECTED UPON BECOMING A PROBATIONARY EMPLOYEE?

II. WHETHER A CLASSIFICATION OF "PROBATION", WITHOUT SAFEGUARDS TO PREVENT DISCRIMINATION, IS IN VIOLATION TO SEC. 703 (a), TITLE VII, AND CAN IT BE USED AS A MECHANISM TO DISMISS MINORITIES PRIOR TO THE END OF PROBATION?

III. WHETHER BISHOP AND ROTH WHEN INVOKED BY RESPONDENTS AS A DEFENSE AGAINST DISCRIMINATION FORECLOSED ON RIGHTS PRO-VIDED OR BY GRIGGS AND McDONNELL

IV. WHETHER BISHOP v. WOOD SHOULD BE OVERRULED, OR REDEFINED, IN ITS' APPLICATION TO MEMBERS OF THE PROTECTED GROUP WHEN THEY ARE PROBATIONARY/WORKING TEST?

V. WHETHER THE INVOLUNTARY SEPARATION RULE 12.301.1 IS VAGUE IN ITS MEANING, AND BY PETITIONER'S SPEEDY TERMINATION, IS ITS APPLICATION ARBITRARY AND FORECLOSED ON 1ST AMENDMENT AND SECTION 704 (A) RIGHTS TO SPEAK AGAINST DISCRIMINATORY TREATMENT AGAINST HIS PERSON?

VI. WHETHER NOT BEING ALLOWED ACCESS TO IN-HOUSE GRIEVANCE PROCEDURES IS IN VIOLATION TO SEC. 704 (a), TITLE VII?

VII. WHETHER ROTH, AND PICKERING SHOULD BE OVERRULED, OR REDEFINED, IN THEIR APPLICATION TO PROTECTED GROUP 704 (a) RIGHTS?

VIII. WHETHER PETITIONER PLACED BEFORE THE COURTS SUFFICIENT PRIMA FACIA INFORMATION/EVIDENCE FOR DISCRIMINATION AND RETALIATION?

IX. WHETHER DISCRIMINATION WAS THE RESULT?

CERTIFICATE OF INTERESTED PERSONS

I HEREBY CERTIFY that the following persons are interested in the outcome of this case:

The Honorables Godbold, Chief Judge, Roney, and Tjoflat, Circuit Judges, 11th Circuit.

The Honorable Marvin H. Shoob, District Court for the Northern District of Georgia.

Roland A. Jones, Lt. Col., U.S. Army (ret.) (Petitioner).

Respondents:

Dr. L. Patricia Johnson, Division of Family and Children Services (DFACS), DHR, 47 Trinity Avenue, S.W., Atlanta, Georgia 30334.

Mr. Douglas G. Greenwell, DFCAS, DHR, 47 Trinity Avenue S.W., Atlanta, Georgia 30334.

Mr. Truman A. Moore, DFACS, DHR, 47 Trinity Avenue S.W., Atlanta, Georgia 30334.

Mrs. Barbara G. Deedy, DFACS, DHR, 47 Trinity Avenue S.W., Atlanta, Georgia 30334.

Ms. Diana K. Fox, DFAC, DHR, 47 Trinity Avenue S.W., Atlanta, Georgia 30334.

Mr. Wayne P. Yancey, Attorney for Respondents.

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CONSTITUTIONAL AND FEDERAL PROVS. INVOLVED

any person within its jurisdiction the equal protection of the laws" [emphasis supplied].

FEDERAL LAWS

42 U. S. C. 1981 - This provides in part that "all persons... shall have the same right in every State...to the full and equal benefit of all laws..."

42 U. S. C. 1983 - This provides that "every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects...any citizen...to the deprivation of any rights...shall be liable to the party injured..."

42 U.S.C. 2000e, subsections (a) and (b), provide as follows:

For the purposes of this subchapter-
"(a) The term `person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.....32, 37, 38

SECTION 703(a) provides in part:

"It shall be an unlawful employment practice ... (1)...to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment... (2) to limit, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee..."

SECTION 703(h) "Notwithstanding any other provisions of this subchapter, it shall be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide ... merit system..."

SECTION 704 (a) states that it shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he opposed any practice made an unlawful employment practice...or because he has made a charge...in any manner

GEORGIA LAW

FEDERAL RULES

MERIT SYSTEM RULES

SEE APPENDIX F FOR OTHER RULES

IN THE

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v.

DEPARTMENT OF HUMAN RESOURCES (DHR), STATE OF GEORGIA, et al.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIR.

The Petitioner, Roland A. Jones, respectfully petitions this Court for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit for a discrimination complaint.

OPINION BELOW

On March 23, Petitioner's Petition for Rehearing with a suggestion for Rehearing En Banc was denied and judgment against Petitioner's Discrimination and Retaliatory Discharge Complaint was affirmed, with prejudice,

pursuant to, and justified by Bishop v. Woods, 426 U. S. 341, 349-50, 96 S.Ct. 2074, 2079-80, Board of Regents v. Roth, 408 U. S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), Pickering v. Board of Education, 391 U. S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968), and F. R. Civ. P. Rule 12 (b). The Court of Appeals Memorandum decision at Appendix A affirmed only the 1893 claim. The District Court's Bishop, Roth dismissal judgment against Petitioner's discrimination complaint is at Appendix B. An F. R. Civ. P Rule 60 (b) (6) again asserting review of all the discrimination issues was denied May 24, 1984, Appendix B3.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code.

CONSTITUTIONAL PROVISIONS INVOLVED:

1st Amendment, U. S. Constitution
5th Amendment, U. S. Constitution
14th Amendment, U. S. Constitution

FEDERAL STATUTES INVOLVED:

42 U. S. C. 1981, 42 U. S. C. 1983, 42 U. S. C. 2000e, Section 703 (a), 703 (h), and 704

(a), 706 (g) (2000e-5).

STATE STATUTES INVOLVED:

Georgia Law, Article IV, Section 6, Para. I, State Constitution of 1976, Merit System Act (GA Law, 1975, P 79), Georgia Law, 1975, Section 7, Adverse Actions, Appeals and Hearings, Georgia Law, Section 45-20-2 (16) and (17), and Georgia Employment Security Law, Section 6 (a) with reference to the requirement: "provide employee with...document...giving the reasons for separation."

FEDERAL RULES INVOLVED:

Rule 12 (b) (1) and (b) (6), Rule 12 (e),Rule 37, Rule 41 (b), Rule 60 (b) (6).

MERIT SYSTEM RULES AND REGULATIONS INVOLVED

(See Appendix E)

STATEMENT OF THE CASE

This action was filed November 19, 1982 in the United States District Court for the Northern District of Georgia, pursuant to 42 U.S.C. 1981, 1983, and 1985, and the First and Fourteenth Amendments, alleging that defendants entered into an agreement and an ensuing

and continuing "pattern" of disparate treatment, "discrimination", and "retaliation" designed to deny appellant other job opportunities within the division; because of appellant's opposition to discriminatory practices and procedures used by the supervisors, supervisors in the Division of Family and Children Services (DFACS) terminated petitioner's employment with the DFACS, DHR, using practices and procedures that were made unlawful under, Title VII, U. S. Supreme Court decisions, and decisions against the DHR in this circuit (Kennedy v. Crittenden, CA77-200 (MD GA 1982).

The complaint covers ten charges (10) of Grievous Causes as Defined in Par. F.103 Regulation F, State Merit System Rules and Regulations, identified in the State of Georgia Merit System's list of Grievous Causes that could be brought within the Grievance Procedure of the State Merit System at Appendix J2: 1. unlawful discrimination because of race, 2. unfair discriminatory treatment, 3. erroneous interpretation of DFACS/DHR policies, 4. erro-

neous application of DFACS/DHR policies, 5. erroneous interpretation of the State Merit System's Rules and Regulations, 6. erroneous application of the State Merit System's Rules and Regulations, 7. capricious interpretation of DFACS/DHR policies, 8. capricious application of DFACS/DHR policies, 9. capricious interpretation of the State Merit System's Rules and Regulations, 10. capricious application of the State Merit System's Rules and Regulations, 11. operating a probationary period that is wholly subjective, and 12. arbitrary discharging Petitioner using the ambiguous Involuntary Separation Rule 12.301.1 coupled with the DHR Rule A.6.a (App. F#32) to foreclose in-house grievance rights.

The complaint contains a demand for a jury trial for a deprivation of civil rights for $250,000.00 against each Respondent, individually and in their capacities, and punitive damages of $250,000.00 against each Respondent, individually and in their capacities. The action also seeks injunctive relief, rein-

statement with all rights/benefits retroactive, legal expenses, and any other action deemed appropriate by the court.

The complaint set forth all the discriminatory event-by-event facts and circumstances covering a four month, 23 day period (App. D), and copies of the rules and regulations (App. F) violated by the DFACS, DHR supervisors.

A Petition for Respondents to produce appellant's personnel records and other DHR/DFACS records necessary to maintain Petitioner's Complaint was filed, at the time of filing the complaint. This Petition was denied. Statistics (App. E) were provided the District Court in a Motion for Reconsideration citing Griggs and McDonnell Douglas. This Motion for Reconsideration with additional evidence of discrimination was denied. Other motions/requests denied by the District Court include: 1. Request for the "sealed" District Court documents pertaining to the case of Marvin Albitz v. State of Georgia, CA79-634A (P) be opened for Petitioners inspection and

Petitioner's use as evidence of patterns of discriminatory standard operating procedure (SOP) in state government. 2. Reinstate Petitioner's discrimination complaints in its entirety, including the demand for a "jury trial." 3. Withdraw the judgment against me. 4. Amend complaint to add as defendants also engaged in the ensuing and continuing pattern of conduct designed to terminate and perpetuate the termination in the same amounts and conditions as outlined for defendants already at pages 50, 51, and 52 of basic complaint. To be added as defendants: a. Merit System Commissioner Charles E. Storm. b. ex-DHR Commissioner Dr. Joseph Edwards (Involuntarily separated, retired). c. ex-DHR Personnel Director Miss Martha Meyer (Involuntarily separated, retired). d. DFACS Office Director, Ms. Joyce Saye for hiring outside DFACS Training Coordinator. e. Personnel Supervisor Ms. Alice N. Echols. f. The Deputy Director of the State Merit System, Mr. Franklin Thomas, dereliction of duty. g. The Director

of the Georgia Office of Fair Employment Practices, Ms. Jewell Saunders (now terminated)...dereliction of duty. h. Merit System Staff Management employee, Mr. James Huges, dereliction of duty. 5. Leave open the privilege to add others, as they are determined, including those in positions of "trust" and "administrative" responsibility shown to have been negligent in the performance of their duty, thereby, perpetuating my termination by not assuring the proper application of the rules and regulations or by not questioning the oddity of the events and circumstances connected with my termination; however, in all fairness I will readily agree to a dismissal from my complaint any individual, named or added, who reasonably shows the Court that they were not negligent in the performance of their positions of trust and responsibility. 6. Leave open the option of amending my complaint to include <u>other "probationary" employees similarly situated</u>. 7. Leave open the option for other organizations to enter on

my behalf or as friends of the court. 8. Defendants be ordered to provide data for exhibit J for the years 1980, 1981, and 1982 for the total state work force, DHR, and DFACS for the Court. 9. Request an injunction be issued prohibiting the expenditure of federal funds by the Department of Human Resources pending resolution of this matter; and an injunction be issued prohibiting all promotions and hiring within the Department of Human Resources pending resolution of the issues at bar. 10. Request an affirmative action "quota" system for hiring minorities in entry level (probationary level) and the top administrative jobs of the state. 11. Request that all federal funding be withheld from the Department of Human Resources, the Division of Family and Children Services, and the state until reasonable levels of minorities are attained at all levels of government.

The statistics (App. E) claiming that Griggs and McDonnell Douglas applied were submitted and also included in Opening Brief

placed before the U. S. Court of Appeals for the 11th Circuit and denied. Other motions and requests submitted and denied by the U. S. Court of Appeals: 1. Motion to gain access to the sealed District Court records and transcripts for the Albitz discrimination case against the State of Georgia. 2. In view of the Bishop syndrome and its application to discrimination and because of the possibility of a misunderstanding of the nature of the complaint, a motion to refile the case as a new case was filed. 3. Motion for immediate remand for consideration of the discrimination issues. 4. Motion to relocate the case to the Middle District of Georgia. 5. Motion for relief pursuant to F.R.Civ. P Rule 60 (b) (6). 6. Letter citing as newly discovered historical evidence of the trend of the DHR not providing employees a reason for their discharge was returned without action.

SUMMARY OF ARGUMENT

I. At the time of the filing, as is now, I was underrepresented only because no counsel

would accept the case because of the Bishop probationary employee syndrome. This is tantamount to raising a federal constitutional question, and is an extraordinary circumstance for triggering the application of Federal Rule 60(b)(6) and giving justice another opportunity to be heard. When Rule 60(b)(6) is applied, it should work the way an aggrieved citizen expects their legal system to work by permitting final judgment to be vacated, modified, and reexamined; however, in the face of all the 11th Circuit Court of Appeals Precedents concerning discrimination submitted still claiming Griggs and McDonnell Douglas applied with a request for the application of Rule 60(b)(6), the Court denied the application which tends to signal that the legal system resents pro se actions and punishes them with a misapplication of justice. The District Court's order plainly provides reason for officials not to comply with "guidelines" (Affirmative Action, included) established against discrimination.

II. Although underrepresented, the facts and circumstances submitted to the District Court (App. D) and the Court of Appeals conveyed the message of discrimination; however, respondents complained to the District Court that the number of pages exceeded the administrative page requirement by five pages...a procedural question rather than substantive. It is obvious that the District Court Judge was more interested in procedure rather than substance because of his ruling at Appendix B2. His concern only for the length of the Motion was clearly an abuse of discretion. Judge Shoob's preoccupation with the "lengthy brief" (App. B2) guided his judgment to administration rather than the substantive discrimination content of the brief. For this matter to be understood, Appendices D, E, F, G, and the J series, herein, must be read and compared. It is obvious that the trend as indicated by both courts with their refusal to confront the issues and the facts is anti-pro se. If not, the judgment would have been in the alterna-

tive as Respondents requested: "...move for more definite statement of plaint's claims, pursuant to 12 (e) F.R.Civ.P., or dismissed without prejudice, would not have attempted a catch-all 1983 disposal (App. B), and F.R.Civ.P Rule 60 (b) (6) claim would have been honored when invoked by Petitioner, and the judgment would not have been left to appear to be a punitive discouragement against pro se filings. It is also obvious that both courts are unaware of a Second Circuit holding that:

> "pro se complaints are held to less stringent standards than formal proceedings drafted by lawyers" Hohman v. Hogan, 597 F.2d 490 (2d Cir. 1979).

III. Even if I lack the forensic skills and do not plead persuasively, I am confident that the Supreme Court will read and study the facts contained at the Appendices and will not permit a meritorious effort to be lost simply because I am pro se.

IV. Motion to dismiss at pleading stage for lack of jurisdiction should be treated with caution and denied if petitioner alleged suf-

ficient facts in his complaint (Apps. D and E) to support reasonable inference that respondents can be subjected to jurisdiction. Motions to dismiss for failure to state claim should be denied unless it appears beyond doubt that plaintiff can prove no set of facts. Bracewell v. Nicholson Air Services, 680 F.2d 103 (11th Cir. 1982 Ga.). Dismissal of a civil rights suit, alleging racial discrimination in employment practices, is appropriate only when plaintiff has not made a prima facie case. [Civil Rights Act of 1964, 701 et seq., 42 U.S.C.A. 2000e et seq.; Federal Rules Civ. Proc. Rule 41(b), 28 U.S.C.A]. Junior v. Texaco, Inc., 688 F.2d 377 (11th Cir. 1982). Dismissal is generally proper only where less drastic sanctions cannot substantially accomplish its purpose. Federal Rules Civ. Proc. Rule 37, 28 U.S.C.A. EEOC v. Troy State University, 693 F.2d 1353 (11th Cir. 1982 Ala.). The 5th (11th) Court of Appeals has noted that:

"...[W]e do not believe that individual

federal judges should have almost unchallengeable power to slow or halt the progress of well-intentioned efforts to eradicate the effects of past discrimination and prevent future discrimination." Accordingly, the Court of Appeals undertook a de nova review. U.S. v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980).

V. A Federal District Court and a Court of Appeals are not duty bound to follow conflicting precedents of Bishop which bear no similarity to discrimination and no uniformity as to discrimination claims brought within the 11th Circuit. They are, however, duty bound to follow the preponderance of precedents established by the U. S. Supreme Court and precedents established within its own 11th (old 5th) circuit.

VI. A Conflicting Federal Court decision dealing with discrimination and the restrictions placed on probationary employees has resulted due to interpretation of Bishop v. Wood. Accordingly, Bishop v. Woods must be overruled or redefined in its' application in cases where Griggs v. Duke Power Co., and McDonnell Douglas v. Green are involved.

VII. No summary of a court case can capture the subtlety of reasoning and argumentation which marks every page of an appellate decision; any summary represents a compression of sometimes lengthy and complex decisions. Contrary to widely held belief, court cases are written in the English language. Judicial opinions are seldom beyond the comprehension of the layman or, needless to say, the professional manager or personnelist.

VIII. In our system of separation of powers the courts are the final arbiters of constitutional interpretation and of statutory construction. Unless an appellate court's determination is overturned by a higher appellate court or modified by subsequent legislation or by a constitutional amendment, it carries precedential authority and is binding within the boundaries of the court's jurisdiction. Bishop, Roth, and Pickering must not be allowed such authority in discrimination against minorities probationary or otherwise.

IX. Petitioner contends that the Petition for

a Writ of Certiorari should be granted for the reasons that the Eleventh Circuit Court of Appeals has rendered a decision in Petitioners case that is in conflict with base-line legal distinctions classifying discrimination as not disposable under Bishop, Roth, and Pickering. As a result of these time-worn precedents, mind-sets have developed causing erroneous classifications of members of the protected group into the Bishop class of employees, resulting in the issuing an illogical decision that is in conflict with the correct civil rights law in light of the historical purpose.

X. A lack of uniform decisions within the circuit creates havoc among decisions on similar questions throughout the Federal Circuits. Thus, Bishop merely created a general guideline of procedures that did not define its impact on discrimination law.

XI. This case boils down to Petitioner having rights to file an in-house grievance for the Merit System and Civil Rights deprivations. However, these rights were foreclosed by Sec.

704 (a) termination, and full rights further foreclosed by the Court.

XII. With the power to destroy the remedy for discrimination goes with it the power to destroy the right. A destruction of rights is clearly a substantive constitutional question which the Court should address and resolve.

REASON FOR GRANTING THE WRIT

Where petitioner is a member of a protected group, due process demands that he receive his FULL rights and equal protection under law.

The application of Bishop and Roth by the courts and is in direct conflict with many other appellate holdings on discrimination and denies full rights contained in the tenants of the Constitution, the First, Fifth, and Fourteenth Amendments, the Due Process Clause, equal protection laws, and civil rights laws. The conflict is so deeply entrenched in mind-sets and decisions so as to call for this Court's exercise of the power of supervision and a clear direction of uniformity.

Neither the District or the Appeals Court

reached the merits of the case and did not rule on the issues of discrimination and rights placed before them (App. K). The District Court dismissed per F. R. Civ. P. Rule 12 (b) (1) (6). On the contrary, a Court of Appeals cannot sustain Federal District Court's dismissal unless it is beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. Federal Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.A. Carpenters Local Union No. 1846 of United Broth. of Carpenters and Joiners of America, ALF-CIO v. Pratt-Farnsworth, Inc., 690 F.2d 489 (11th Cir. 1982). It is impossible to be beyond any doubt when the District court did not reach the merits of the case. Dismissal of a civil rights suit, alleging racial discrimination in employment practices, is appropriate only when plaintiff has not made a prima facie case. [Civil Rights Act of 1964, 701 et seq., 42 U.S.C.A. 2000e et seq.; Federal Rules Civ. Proc. Rule 41(b), 28 U.S.C.A]. Junior v. Texaco, Inc., 688 F.2d 377 (11th Cir. 1982).

The circumstances and events (App. D) were provided to both courts, in actions challenging administrative action as discriminatory, even where a stark pattern of discrimination is not evident, both courts did not consider, but should have considered the specific sequence of events leading up to the challenged decision, the departures from normal procedural sequence, the foreseeability of discriminatory impact, and the availability of less discriminatory alternatives [e. g. There are 15 Merit System Rules that provide for less punitive remedies than dismissal (App F, #35 - 49), and more than 15 rules and regulations that should not have been preempted by dismissal that authorized Petitioner the right to file a grievance within the State Merit System (App. F)] discriminatory alternatives. Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983). Had I been white, the rules would not have been operated more harshly on me and would have operated with a less punitive alternative than discharge. 1. The District

Court, by reference to "lengthy brief", was either too preoccupied with the complaint from the respondents that Petitioner's complaint was prolix and exceeded the page count by 5 pages, or there was a predisposition (Bishop) that oppressed, preempted, and foreclosed on the issues of discrimination invoking extraordinary circumstance, thereby, triggering F. R. Civ. P Rule 60 (b) (6). 2. The Court of Appeals incorrectly applied Bishop to issues of discrimination, and incorrectly applied Roth to expressions of grievances while in DFACS, DHR in contradiction to decisions of this and other circuits (See cases listed below) and in contradiction to Section 704 (a), Title VII. 3. The District Court, ignored the proper application of principles, prima facia, and burden of proof standards established by the U. S. Supreme Court and decisions of this and other circuits, and refused petitioner discovery. 4. Both the District Court and the Court of Appeals by joining in judgment are perpetuating defen-

dants past/present discrimination reputation. 5. Both courts denied petitioner access records and transcripts pertaining to Albitz v. State of Georgia and the patterns of discrimination within the Merit System of the State of GA in the sealed court records and transcripts. 6. Agaisnt Jean, both Courts ignored the historical background for the DHR's reputation for discriminating in Albitz v. State of GA, Kennedy v. (DHR) Crittenden, CA 77-200 (MD GA 1982) when Mr. Albitz testified:

> "we are indeed a partner with the agencies to maintain a discriminatory posture, using our own rules and regulations to accomplish this.",

In Whittaker v. DHR, the conclusions of law used by the District Court, ND Georgia that plaintiff, a probationary employee for Georgia DHR had not attempted to identify any of the Merit System's practices and procedures as discriminatory. The Court allowed great latitude to plaintiff:

> "so that the plaintiff could challenge either employment practices...or policies affecting working test employees." In the footnote "the Court also extended class discovery so that the plaintiff would have

full opportunity to explore the allegedly discriminatory system-wide employment practices" (used against DHR probationary employees Whittaker v. DHR, CA79-2311A, 30 FR Serv 2d 931, 1980).

These Whittaker probationary latitudes were not allowed in Petitioner's case. 7. In addition to both courts denying me access to court records for the Albitz case, the District Court denied my motion for defendants to produce documents. 8. Both courts considered only Bishop and Roth and did not addressed: a. Disparate treatment/impact in the denial of length of service and benefits from the first day that I actually reported to work, and improper work assignments. b. Discrimination in denying petitioner opportunity for the position of Director of Management Information Systems in order for the position to be given to a white male who was from outside of the DFACS, DHR, and the State Merit System. c. Discrimination in denying petitioner the opportunity for the position of Training Coordinator in order that the position could be given to a white female who was from outside

of the DFACS, DHR. d. Discrimination/disparate treatment for not being allowed to file a formal grievance, in accordance with State Merit System Rules and Regulations. State Merit System Rule 14.212 states:

> "A person who feels that there has been a violation of the Rules and Regulations or Merit System Law which adversely affects his rights may appeal..." (See # 20, App. F).

and Rule 14 states:

> "An employee who believes he has been unjustly discriminated against in his employment...may appeal to the Board..." (See # 19 at App. F).

e. Disparate treatment/impact for improper discharge, short of completing the working test, in violation of Merit System Rule 11, by means of supervisor retaliatory subjectiveness. f. Retaliation/disparate impact for being abruptly discharged under Rule 12.301.1 without "advance" notice as required by the rules and regulations and for expressing my grievances concerning relief. g. Disparate treatment for not being allowed to invoke the exception clause of Rule 12.301.1 "...the separation cannot be appealed except as other-

wise provided in these regulation" (App. F #8, 12-31, 33, 34), and file a grievance since the discharge was also a grievous action in itself. h. Or, filing a grievance for any action listed as non-grievous which automatically became grievous if discrimination is charged (Submitted as Ex "M", first and last page, RECORD OF EXCERPTS FOR REPLY and Exs "G" and "D", PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC).

(I)

A MEMBER OF THE PROTECTED GROUP IS STILL PROTECTED UPON BECOMING A PROBATIONARY EMPLOYEE.

(II)

A CLASSIFICATION OF "PROBATION", WITHOUT SAFEGUARDS TO PREVENT DISCRIMINATION, IS IN VIOLATION TO SEC. 703 (a), TITLE VII, AND CAN BE USED AS A MECHANISM TO DISMISS MINORITIES PRIOR TO THE END OF PROBATION.

(III)

BISHOP AND ROTH WHEN INVOKED BY RESPONDENTS AS A DEFENSE AGAINST DISCRIMINATION FORECLOSED ON RIGHTS PROVIDED FOR BY GRIGGS AND McDONNELL.

(IV)

BISHOP v. WOOD SHOULD BE OVERRULED, OR REDEFINED, IN ITS' APPLICATION TO MEMBERS OF THE PROTECTED GROUP WHEN THEY ARE PROBATIONARY/WORKING TEST.

(IX)

DISCRIMINATION WAS THE RESULT.

Due process is not a technical conception with a fixed content unrelated to time, place and circumstances; instead, it calls for such procedural protections as the particular situation demands. U.S.C.A. Const. Amend. 14. Central Freight Lines, Inc. v. U.S., 669 F.2d 1063 (11th Cir. 1982). The very nature of due process precludes establishing an inflexible procedure applying without variation to vastly variegated situations. Const. Am. 5, 14. Smith v. Rabalais, 659 F.2d 539 (5th Cir. 1981).

Bishop and Roth are inflexible barriers to claims of discrimination by minority "probationary" employees and operate more harshly against minorities on the job and in court:

> "Merely classifying positions as 'probationary' or 'permanent' does not resolve the hearing question..." (by Justice Rehnquist in Bishop v. Wood, 426 U.S. 426,

344 (1976)).

In 1976 Justice Rehnquist signaled that Bishop would be in direct conflict with other laws and other U.S. Supreme Court rulings. This observation recognizes the long-range, compounding, self-perpetuating, lasting adverse effects of the problem of no hearing falling more harshly on minorities when they are "probationary employees". Minority probationary employees are also denied access to in-house Merit System Grievance Procedures. The inequities in Bishop and Roth provide the foundation for discrimination against minorities during a sort of "twilight zone" period of employment called the probationary period. It leaves minority probationary employees vulnerable to uncontrolled discrimination and dismissal without the protection of law.

Comparing all the law submitted me against the Bishop analogy submitted by Respondents for dismissal to the selection made by both courts, a "picture" of justice out of balance is at (Figure 1):

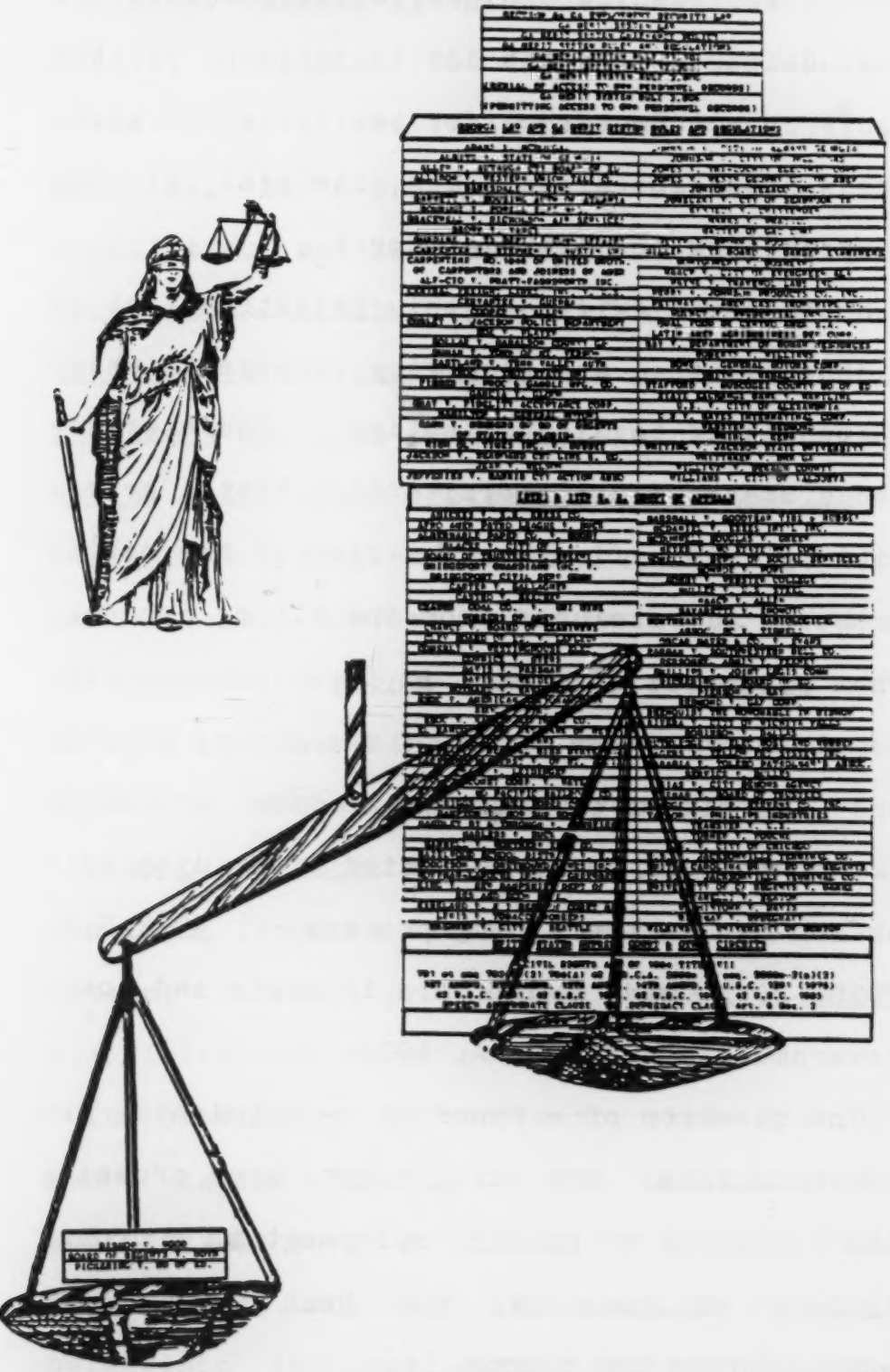

Figure 1

The application of incorrect precedents by the Court of Appeals in its judgment of the facts does not correct for the tests and standards foreclosed on by the dismissal of the complaint by the District Court.

Both courts relied on this unilateral set of Bishop, Roth, and Pickering precedents which is unrelated to discrimination. These precedents assert a unilateral notion that a probationary classification, a part of the hiring process, is excluded from the hiring process. When Bishop is applied, it forecloses on the completion of the cycle of the hiring process and the rights of a member of the protected group who is to be protected from discrimination during the hiring process. 42 U.S.C. 2000e-2(a), made applicable to state and local governments on March 24, 1972.

The question of a minority relinquishing his constitutional and civil rights when crossing the threshold of public employment as a probationary employee has not been adequately addressed by the courts.

Bishop, Arnett v. Kennedy, 416 U.S. 134 (1974), and Roth, 408 U.S. 341 (1972) establishes an irrebuttable presumption that a minority, as a probationary, is not a person/citizen and is, therefore, without any protection against discrimination and not entitled to due process rights under the 14th Amendment and laws providing against discrimination under equal protection under the law.

Bishop and Roth contradict the Constitution and previous Supreme Court decisions on discrimination. Bishop and Roth operate more harshly against minorities when they are employed as probationary employees.

Bishop and Roth, provide an illegal argument and legal loophole against claims of discrimination, thereby, providing a basis for future discrimination, under color of law.

In dismissing my complaint, the district court relied heavily on the ambiguous and arbitrary language of Bishop and Georgia State law. Acting together, they are a loop-hole built-into the legal system designed to pro-

tect against mechanism for discrimination. The language of Bishop provides an easy mechanism and an additional tool that is used to circumvent civil rights of minorities when they are in a "probationary" status.

It is obvious that Bishop was enacted to control the number of frivolous personnel actions being placed before the court; however, while accomplishing its purpose, in 1976, in the 1980s it now operates more harshly on minorities as a class.

According to Bishop (and/or Roth), all acts of discrimination are justified because they are merely "incorrect or ill-advised" personnel decisions.

No petitioner/plaintiff argument against discrimination or other wrongful acts can ever survive under a court predisposition that states:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed

> to require federal judicial review of every such error....the Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." Bishop v. Wood, at 349-50 (1976).

In this context, Bishop is in direct conflict with laws against discrimination, because all discrimination is the result of personnel decisions. And, under the above Bishop rule, incorrect or ill-advised discriminatory personnel decisions are not actionable.

> "the fact that the rules and regulations of the State Personnel Board might provide for certain procedures for terminating a `working test employee' does not mean that plaintiff has a federally-protected interest in assuring that state officials comply with the Board's guidelines."

However, the State Merit System Rules and Regulations (Rule 2.202d, Pg. 7) states:

> (Rules) "shall have the force and effect of law and shall be binding upon the state departments covered by the law."

The Merit System Personnel Board establishes the guidelines (Merit System Rules) against discrimination per 42 U.S.C 2000e-2(a) made applicable to state and local governments in 1972. The above statement in Bishop lays

out an impossible course for an employee to follow. The Merit states that the rules, which include anti-discrimination rules, have the force and effect of law and must be followed, but the court says, however, that the officials are not required to "comply" with the rules (App. B). This encourages discrimination that is sanctioned by the courts. The District Court in judgment against Petitioner citing that state officials did not have to comply with the guidelines, states plainly that officials are not required to follow any of the State of Georgia's Merit System Rules (Personnel Board guidelines) since they are established by the Personnel Board constitute the employment contract between the employee and the employer. Not only is it an impossible and conflicting course, it is in direct conflict with the Civil Rights Act and Adams v. McDougal, 695 F.2d 104 (11th Cir. 1982 La.): the term "contract," as used in Civil Rights Act, refers to a right in the promisee against the promisor, with a correlative special duty

in the promisor to the promisee of rendering the performance promised. (See also 42 1981).

A contract (Merit System Rules and Regulations) cannot be binding on one party (the minority probationary employee) and not be binding on the other party (Georgia Official) (Adams v. McDougal, 695 F.2d 104 (11th Cir. 1982 La.). Bishop and Roth are being used as legal mechanism (barriers) for discrimination. And, in Hamilton v. General Motors, 606 F.2d 576 (5th Cir. 1979) it is stated:

> ...evaluations by all white supervisors provide a ready mechanism for discrimination."

When compared against the Constitution, there is no distinction allowed for a difference in the rights and treatment of this particular class of minority probationary employee, and when also compared to general and civil rights law, Bishop and Roth are out weighed; however, left to interpretation they provide a legal mechanism used to discriminate against minority probationary employees.

The 5th (11th) Court of Appeals agreed that

the use of the word "or" in Title VII's prohibition of discrimination based on race, color, religion, sex, or national origin evidences the intent of Congress to prohibit employment discrimination based on any or all of the characteristics. In the absence of a clear expression by Congress that it did not intend to preclude protection against discrimination directed especially toward black women (minority probationary employees) as a class, separate and distinct from the class of women and the class of blacks, the court refused to condone a result which leaves black women [minority males] without a viable Title VII remedy. The court utilized the judicial reasoning in the line of "sex plus" cases [see, for example, Barnes v. Costle; Willingham v. Macon Telegraph Printing Company; and Stroud v. Delta Airlines, in support of the proposition that an employer may not single out a portion of the protected class for discrimination. The court remanded. Jefferies v. Harris County Community Action Association, 615 F.2d

1025 (5th Cir. 1980).

Bishop and Roth, coupled with the use of the ambiguous Georgia laws, reinforced by a single ambiguous Involuntary Separation Rule 12.301.1 (App. F, #10) in the State Merit Systems Rules and Regulations, coupled with a special rule (App. F, #32) used by DHR to prohibit the filing of a grievance authorized by the rules (App. F, #s 8, 12-31, 33, and 34) once the employee has been notified of termination overriding the 15 day time period authorized for filing, overrides the preponderance of laws against discrimination. Again, one DHR rule is used to "overrule" twenty three rules of the higher authority, the State Merit System.

With or without considering the questions of property or liberty interest, there can be no such distinction or classifications for minority probationary employees with birth rights under the Constitution; such a distinction is in contravention with the prohibition against classifications in Section 703

(a) (2), Title VII. The 14th Amendment extends itself to persons as citizens by its terms alone. It has been reasoned that Bakke also extended the 14th Amendment to persons-citizens.

> "The guarantees of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." (The 14th Amendment is extended to "persons" by Bakke) University of California Regents v. Bakke 438 U.S. 265 (1978).

Being a person, ENTITLED DUE PROCESS has, thus far, been fully extended to everyone and everything[1/] except minority probationary employees.

1/
Aliens are "persons" within meaning of the Fourteenth Amendment. (Cervantes v. Guerra, F.2d (5th Cir. 1981)).

Aliens, those illegally within territorial boundaries of United States, are entitled to equal protection of the laws; they are presumed to be persons. (Doe v. Plyler, 628 F.2d 418 (5th Cir. 1980 Tex.)).

Non-citizens have a liberty interest. (Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)).

Minors are "persons" and have fundamental rights which state must respect. (Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981 La.)).

(V)

THE INVOLUNTARY SEPARATION RULE 12.301.1 IS VAGUE IN ITS MEANING, AND BY PETITIONER'S SPEEDY TERMINATION, ITS' APPLICATION IS ARBITRARY AND FORECLOSED ON 1ST AMENDMENT AND SECTION 704 (A) RIGHTS TO SPEAK AGAINST DISCRIMINATORY TREATMENT AGAINST HIS PERSON

(VI)

NOT BEING ALLOWED ACCESS TO INHOUSE GRIEVANCE PROCEDURES IS IN VIOLATION TO SEC. 704 (a), TITLE VII.

(VII)

ROTH, AND PICKERING SHOULD BE OVERRULED, OR REDEFINED, IN THEIR APPLICATION TO PROTECTED GROUP 704 (a) RIGHTS.

(IX)

DISCRIMINATION WAS THE RESULT.

1/ Cont.

Corporation (a thing) is a "person" who possesses Fourteenth Amendment due process rights which are protected by federal statute. (Northeast Georgia Radiological Associated, P.C. v. Tidwell, 670 F.2d 507 (5th Cir. 1982).

Employers are persons. (42 U.S.C. 2000e, (b)).

One or more individuals, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stack companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers are persons. (42 U.S.C. 2000e, (a)).

It is the right of every person to express his First Amendment rights concerning his welfare, health, and acts of discrimination against him. This right of expressing grievances is reinforced by the grievance procedures in the contract of employment (See Adams v. McDougal, 695 F.2d 104 11th Cir. 1982, the Merit System Rules and Regulations). Retaliation in the fashion of dismissal is illegal.

With regard to the Appeals Court applying Pickering, to prove a prima facie of violation of First Amendment rights, it must be shown that: (1) The speech or activity is protected under the First Amendment; (2) The protected activity was the motivating factor in the action taken against the minority probationary employee; (3) The action would not have been taken absence the protected Section 704 (a), Title VII activity. Mt. Health City School District Board of Education v. Doyle, 429 U.S. 274 (1977); Givhan v. Western Line Consolidated School District, 429, U.S. 410 (1979).

The question of whether an activity is pro-

tected under the 1st Amendment and Sec. 704 (a) is a question of law. The remaining two questions, whether the protected activity was a substantially motivating factor in the action taken, and whether the action taken would have occurred absent the activity protected by Section 704 (a), are questions of fact that were never decided. See Schneider v. The City of Atlanta, 628 F.2d 915 (5th Cir. 1980).

The actions that can be violations of an employee's First Amendment rights are those actions which take something away from the employee. See Morey v. Independent School District, 312 F. Supp. 1257, 1262 (D.Minn. 1969), aff'd., 429 F.2d 428 (8th Cir. 1970).

To determine whether an activity is protected by the 1st Amendment, a balancing test is used. The balance that must be struck is between the interest of a public employee, as a person and as a citizen. See Pickering, at 568.

The activities, that are protected activities in this case are: 1. The right to object

to the decision not to upgrade my Planner II position to Planner III as informed upon accepting employment (Submitted to the Court of Appeals in the Record of Excerpts [blue cover] page 18, para 1, and page 24, para 19); 2. The right to object to the hiring of a white female from outside for the Training Coordinator position in an organization whose total population was represented by 88.7% female against that of only 1.95% (App. E) minority male population (Submitted to the Court of Appeals in the Record of Excerpts [gray cover] "E","F", and "H", to include the graphs and statistics for my Reply, and at the Record of Excerpts [blue cover]); 3. Petitioner's right to object concerning the lack of opportunity to compete for the Director of Management Information Systems and the hiring of a white male from outside and being told, to keep my nose clean and in two years I might be considered for the position. (Submitted to the Court of Appeals in the Record of Excerpts (blue cover) page 23, para 14-15);

and 4. captioned by Petitioner expressing his right to file a grievances with the 15 day filing period concerning the on-the-job injury, the incorrect tenure starting date; to complain of not being afforded the opportunity for the job as the Director of Management Information systems and Training Coordinator for the DFACS, DHR; and defend my request against the oppressive, and adverse personnel decision made by the division's white Personnel Supervisor. (Submitted to the Court of Appeals in the Record of Excerpts [gray cover] "D1" and "Z4").

A suit brought under discrimination law that alleges discharged from a position because of race and because of opposition to defendant's discriminatory practices cannot be disposed per Bishop. In Corley the 5th (11th) Circuit Court held, that the District Court failed to follow the proper burden of proof because it had not addressed the relevant evidence of pretext. Such evidence is an indispensable element of the Petitioner's case

which must be confronted by the Court. Corley v. Jackson Police Dept, 566 F.2d 994 (5th Cir 1978).

In Williams, a firefighter was engaged extensively in his Section 704 (a) rights, a conduct protected by the First Amendment, which included his filing of affidavit in support of suit challenging city's promotion policies. The firefighter introduced sufficient evidence to create jury question as to whether this conduct was a substantial or motivating factor in abolition of training (probationary) for captain's position and his demotion to rank of lieutenant. [42 1983]. Williams v. City of Valdosta, 689 F.2d 964 (11th Cir 1983).

To establish prima facie case of retaliation for participating in process of vindicating rights through Title VII, a petitioner must only show actions protected by the statute, an adverse employment action, and a causal link between protected actions and adverse employment decision; burden shifts to

Respondents to articulate some legitimate, nondiscriminatory reason for adverse decision. Hamm v. Members of Board of Regents of State of Florida, 708 F.2d 647 (11th Cir. 1983).

Nontenured librarian possessed burden of proof in civil rights action to show that her constitutionally protected conduct under the First Amendment was a substantial or motivating factor in decision not to rehire her. The university was required to demonstrate by a preponderance of the evidence that it would have reached the same decision as to employee's reemployment in the absence of such conduct. [U.S.C.A. Const. Amend. 1]. Montgomery v. Boshears, 698 F.2d 739 (11th Cir. 1983). The court further opined the employer's right to run his business must be balanced against the right of the employee to express his grievances and promote his own welfare. (Also see Adams v. McDougal, 695 F.2d 104 (11th Cir. 1982) (Exs "M", "P", "Q", "R", "S", "S1, "T" of RECORD of EXCERPTS FOR REPLY, and items 14 - 36, Ex "A"/Ex "D", with

REHEARING WITH A SUGGESTION FOR REHEARING EN BANC). Jefferies v. Harris County Community Action Asso., 615 F.2d 1025 (5th Cir. 1980).

In this case and regarding this Petitioner's complaint of retaliation, the Court of Appeals found in Jefferies that there was uncontradicted testimony from both the plaintiff and her supervisor which suggested that plaintiff had notified him of her intent the day before she was dismissed. While the District Court's finding is accurate insofar as no formal notice was received by plaintiff in Jefferies. Petitioner notified the white supervisors of his intent to file a grievance and was discharged before a written grievance could be filed. Formal written "advanced" notice was required in my case per the rules, however, the notice was not signed/sealed/and delivered to Petitioner until the third day after the effective date of Petitioner's dismissal. In Jefferies because the court failed to take into account the informal verbal notice, the court remanded for a decision based

on the entire record. Jefferies v. Harris County Community Action Association, 615 F.2d 1025 (5th Cir. 1980).

An elementary and fundamental requirement of due process in any proceeding under all the circumstances, is to apprise interested parties of the pendency of the action and afford them an opportunity to present their claims. [U.S.C.A. Const. Amend. 14]. Matter of GAC Corp, 681 F.2d 1295 (11th Cir. 1982).

During the term of employment, several memoranda with recommendations for improvement of efficiency and operations of the division's Welfare Budget Planning System were prepared and staffed by Petitioner. Petitioner was openly criticized for criticizing the "dirty laundry" of the DFACS, DHR. These memoranda with recommendations and requests, and speech are most assuredly protected under the First Amendment. Had the evidence been heard, Petitioner is confident that it would have been found that as the result of the memoranda with critical recommendations against DFACS,

the objections to the DFACS supervisors not providing an opportunity for other employment opportunities within DFACS, DHR; the October 5, 1981 memorandum criticizing the Personnel Supervisor for her bad and incorrect decision; all of which combined to make up the discriminatory motive for the Respondents to scheme against Petitioner an irrebuttable discriminatory employment decision of termination.

In a similar 11th Circuit case evidence was sufficient to support a finding that a teachers protected conduct in circulating a letter questioning use of certain earmarked school funds was the sole cause of decision not to renew teaching contracts. Refusal to order reinstatement of the teachers, who had been discharged for exercising her First Amendment rights, was error. [42 1983; Const. Amend 1]. Reinstatement is basic element of appropriate remedy in wrongful employee discharge cases. [42 1983; Const. Amend. 1]. Allen v. Autauga County Board of Education, 685 F.2d 1302 (11th Cir. 1982) In Barnett

evidence was sufficient question as to whether discharge for an improper motive and by means that were pretextual, arbitrary and capricious. [Const. Amend 14]. Barnett v. Housing Authority of City of Atlanta, 707 F.2d 1571 (11th Cir. 1983).

(VIII)

PETITIONER PLACED BEFORE THE COURTS SUFFICIENT PRIMA FACIA INFORMATION/EVIDENCE FOR DISCRIMINATION AND RETALIATION.

(IX)

DISCRIMINATION WAS THE RESULT.

The panel decision is contrary to, and in direct conflict with U. S. Supreme Court decisions on discrimination and uniformity of decisions of the 11th Circuit has not been maintained.

In action challenging Government's allegedly discriminatory administrative action, it is an error to hold Petitioner responsible for any failings of data where almost all data analyzed by Petitioner came from Government (the State of GA documents/information were secured with no assistance from the court), and con-

sidering that the District Court did not allow this Petitioner discovery. Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983). In such actions challenging allegedly discriminatory administrative action, shifting burden to the government to establish special qualifications is appropriate when the data necessary to evaluate alleged qualifications is uniquely in the government's possession. Jean v. Nelson, 711 F.2d 1455 (11th Cir 1983).

McDonnell Douglas v. Green set forth the elements of a prima facie case. The 5th (11th) Court of Appeals joined three other circuits in holding that the McDonnell Douglas formulation is applicable to discharge cases. (Flowers v. Crouch-Walker Corp. 552 F.2d 1277 (7th); Garrett F.2d 864 (6th). Thus, the plaintiffs were required to show that 1) they are members of a protected minority; 2) they were qualified for the jobs from which they were discharged; 3) they were discharged; and 4) after they were discharged, their employer filled the positions with non-minority. Inas-

much as the evidence adduced at trials met this test, the court found that plaintiffs had established a prima facie case of discrimination. Marks v. Prattco, Inc., 607 F.2d 1153 (5th Cir.).

In actions challenging administrative action as discriminatory, where proof of impact alone is insufficient, and where a stark pattern of discrimination is not evident, the District and Appeals Courts should have considered "circumstantial evidence" (See App. D) which includes historical background of decision, specific sequence of events leading up to the challenged decision, departures from normal procedural sequence as well as substantive departures, legislative or administrative history, foreseeability of discriminatory impact and availability of less discriminatory alternatives (Petitioner submitted at page 5, Ex "A", with REHEARING WITH SUGGESTION FOR REHEARING EN BANC) provided for by the State Merit System Rules and Regulations vice dismissal per Rules 12.301.1/DHR A.6.a). Jean v.

Nelson, 711 F.2d 1455 (11th Cir. 1983). Had I been white (and assuming that I was wrong and white), the alternatives to dismissal would have been applied (App. F #35-49), but since I am black, immediate dismissal under the INVOLUNTARY SEPERATION RULE (App. F # 10 followed by # 32 when an appeal is attempted. Also see App. J1). There are 15 rules that provide for less punitive remedies than dismissal (App F. #35 - 49).

Citing the 5th Circuit's extension of the McDonnell Douglas prima facie case test to discharge cases in Burdine v. Texas Department of Community Affairs, it was held that the plaintiff was required to show that 1) he belongs to a group protected by the Act; 2) he was qualified for the job from which he was suspended and not rehired; 3) he was terminated; and 4) after his termination the employer hired a person not in plaintiff's protected class or retained those having comparable or lesser qualifications. The plaintiff must be afforded a fair opportunity to

establish that the employer's asserted justification is in fact, a "ruse" for a discriminatory decision. If the burden is met,

> "our traditional reluctance to intervene in...affairs cannot be allowed to undermine our statutory duty to remedy the wrong."

The plaintiff introduced evidence countering assertions and alleged that he wrote a successful grant proposal, was denied directorship of the program which he proposed contrary to custom, was given inferior working facilities and was relegated to performing menial manual labor in moving to those facilities. Whiting v. Jackson State University, 22 FEP 1296 (5th Cir. 1980). Petitioner was also relegated to performing menial jobs, one of which resulted in an injury requiring two months recuperation. The State fired Petitioner and paid for the hospitalization for the injury.

The four elements of the McDonnell Douglas are not the only ways of proving a prima facie case of racial discrimination in employment. [Civil Rights Act of 1964, 701 et seq., 2000e-

5]. Jones v. Western Geophysical Co. of America, 669 F.2d 280 (5th Cir. 1982).

In order to sustain an 1983 action, the plaintiff must make a prima facie showing of two elements: 1) that the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and 2) that the act or omission was done by a person acting under color of law. [42 1983]. Dollar v. Haralson County, Georgia, 704 F.2d 1540 (11 Cir. 1983).

The 5th (11th) court concluded however, that "where the inference of discrimination is supported by a compelling level of racial underrepresentation in a sizeable work force (See App. E for DFACS, DHR stats), the burden of proving lack of qualifications is on the defendant." The court emphasized that in view of the defendant's policy of hiring at low level and unskilled jobs and promoting to upper level positions based upon training received and skills developed at the plant itself, it is fitting that the defendant be

required to carry the burden regarding an alleged lack of qualified blacks in the community. Likewise, management performance appraisals, experience forms and interviews also provide a "mechanism for subjective actions. "This court recognized that promotion systems utilizing subjective evaluations by all white supervisors provide a ready mechanism for discrimination. (Re: Petitioner was denied an opportunity for promotion to the DFACS position as the Director of Management Information Systems, a position that Petitioner was qualified for (App. H), and denied opportunity for Training Coordinator, a position that the Merit System had rated petitioner better qualified than the DFACS requirments (App. I) at Hamilton v. General Motors.

Like the state's Rule 12.301.1 used in conjunction with the DHR Rule A.6.a, the precedents used by the courts to dispose of my case compounds the insurmountable barrier initially created by the rules (Rule 12.301.1 coupled with the DHR special Rule A.6.a) used

to execute my dismissal. Rule 12.301.1 coupled with the special DHR Rule A.6.a. is an insurmountable barrier. The Rule 12.301.1 (App. F, # 10) "except as otherwise provided for by these rules" clause is overruled by a subordinate DHR special rule (A.6.a) which is used to prohibit filing grievances before the expiration of the 15 day filing period (Regulation F, paragraph F. 402.2). Again, one DHR special rule overruled twenty three other rules. This rule [A.6.a] is nothing but a mere tool for discrimination and oppression of speech, under color of law. According to Handley under the insurmountable barrier test, a statutory scheme which makes the status an insurmountable obstacle to the vindication of rights or the receipt of benefits constitutes a denial of equal protection. [Const. Amend. 14]. A law may violate the constitutional guarantee of equal protection when it conclusively denies to one subclass of benefits which are potentially available to others. [Const. Amend 14]. Handley, By and

Through Herron v. Schweikwer, 697 F.2d 999 (11th Cir. 1983)

Once civil rights plaintiff has established discriminatory impact of employment practice, defendant bears burden of proving that the practice is justified by business necessity. [Civil Rights Act of 1964, 701 et seq. as amended 42 2000e et seq]. If civil rights plaintiff successfully establishes prima facie case of disparate treatment, then burden of production, not persuasion, shifts to defendant to articulate some legitimate, nondiscriminatory reason for its actions, and should defendant carry such burden, plaintiff must establish by preponderance of evidence that defendant's nondiscriminatory reasons are pretextual. Jackson v. Seaboard Coast Line R. Co., 678 F.2d 992 (11th Cir. 1982 Ga.).

Within the context of a Title VII action, disparate impact is when practices that are facially neutral, yet fall more harshly on a protected class of employees; employer's intent is not at issue, and a prima facie case

is established by identification of neutral employment practice (Merit System Rule 12.301.1 coupled with the DHR special Rule A.6.a, App. F, # 32) coupled with proof of its discriminatory impact. Plaintiff can also create inference of discriminatory intent by offering other evidence adequate to create an inference that employment decision was based on a discriminatory criterion illegal under Title VII. Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir. 1983).

Turning to the issue of whether Respondent discriminated against Petitioner (Re: Burdine) in not promoting Petitioner to Director of DFACS Management Information Systems, the court cited the four part McDonnell Douglas prima facie test and found that plaintiff was protected under Title VII from discrimination, that she applied for the Project Director job and was considered, that she was qualified for the job, and that the employer rejected her, and the position remained open and a male was hired. Accordingly, the court concluded that

plaintiff proved a prima facie case of disparate treatment. My case of not being afforded the opportunity for promotion to the position as the Director of Management Information Systems (See Administrative and Officials stats for lack of minorities at App. E) or securing the position as the Training Coordinator for the Division of Family and Children Services (DFACS). DHR was shown by the facts submitted to both courts but was not addressed by either court. The court also noted the Fifth Circuit's additional requirement that defendant prove that those that he hired or promoted were somehow better qualified than plaintiff. Defendants must show by comparative factual data that those hired or promoted from outside of the DFACS, DHR discrimination against black males were (See DFACS stats at App. E) better qualified than Petitioner. "To say that defendant's decision was rational begs the issue; an employer may be rational and still intend to discriminate. Burdine v. Texas Department of Community Af-

fairs, 608 F.2d 563 (5th Cir. 1979)

Under Georgia law, an interest arises whenever a public employee can be terminated only for cause. The DFACS, DHR gives the terminated employee no reason for termination, thereby, protecting themselves, because GA. LAW, 1975, Section 7. Adverse Actions, Appeals and Hearings does not exclude minority probationary employees:

> "NO (emphasis supplied) employee of any department who is included under this Act or hereafter included under its authority and who is subject to the rules and regulations prescribed by the State Merit System MAY BE DISMISSED from said department or OTHERWISE ADVERSELY AFFECTED as to COMPENSATION OR EMPLOYMENT STATUS EXCEPT FOR GOOD CAUSE..."

Section 6 (a), Georgia Security Law, requires that a reason be given upon dismissal. There was no reason given for Petitioner's dismissal. Georgia Law coupled with Respondent's Rule 12.301.1/DHR Rule A.6.a is combination designed to eliminate blacks more so than whites. A statute is facially vague in violation of due process only when

the law is impermissibly vague in all of its applications; facial vagueness occurs when a statute is utterly devoid of a standard of conduct so that it simply has no core and cannot be validly applied to any conduct. High Ol' Times, Inc. v. Busbee, 673 F.2d 1225 (11th Cir. 1982 Ga.)

Petitioner's complaint alleged a causal connection between a constitutional violation. Barksdale v. King, 699 F.2d 744 (11th 1983).

With regard to defendants Rule 12.301.1 coupled with the DHR special Rule A.6.a, under disparate impact theory plaintiff must set forth discrete, facially neutral practices that have a more severe impact on protected group than on unprotected group. [Civil Rights Act of 1964, 701 et seq., 703(a)(2), 42 2000e et seq., 2000e-2(a)(2)]. To establish a prima facie case of employment discrimination, plaintiff need only show that facially neutral employment standards operated more harshly on one group than another. [Civil Rights Act of 1964, 701 et seq., 42 2000e et seq.]. Carpen-

ter v. Stephen F. Austin State University,706 F.2d 608 (11th Cir 1983).

Petitioner argued that the rule (Rules 12.301.1/DHR A.6.a.) [App. F] is discriminatory in impact even if that result was not intended. In Griggs the Court noted that Griggs forbids the use of any employment criteria, even one neutral on its face and not intended to be discriminatory, if, in fact, the criterion causes discrimination as measured by the impact on a person or group entitled to equal opportunity. The court found that Title VII forbids the imposition of burdensome terms (See App. F) and conditions of employment as well as those that produce an atmosphere of racial and ethnic oppression. (Re: Use of Rule 12.301.1 and DHR special Rule A.6.a) Garcia v. Gloor, 609 F.2d 156 modified by 618 F.2d 264 (5th Cir. 1980).

Once plaintiff has made a prima facie case, disparate treatment occurs when employer treats some people less favorably than others. (Re: Whittaker v. DHR findings that "proba-

tionary employees are treated differently); because of race, color, religion, sex or national origin; burden then shifts to employer to go forward with evidence of some legitimate, nondiscriminatory reason for employees rejection, and if that is done, plaintiff, who has ultimate burden, is then afforded opportunity to demonstrate by competent evidence that employer's presumptively valid reasons are a coverup or pretext. If employer is silent in face of presumption raised by it, that is, that employer's acts are more likely than not based on consideration of impermissible factors, court must enter judgment for Petitioner because no issue of fact remains in the case. Allison v. Western Union Telegraph Co., 680 F.2d 1318 (11th Cir. 1982 Ga.).

On equal protection grounds if a law threatens fundamental right or impacts upon suspect class, court must strictly scrutinize law and uphold it only if it is precisely tailored to further compelling government interest; if law does not threaten fundamental right or impact

upon suspect class, it must be upheld only if it bears some rational relationship to legitimate government objective. [Const. Amend. 14]. Doe v. Plyer,628 F.2d 448 (5th Cir 1980).

In employment discrimination cases in which Petitioner is able to prove existence of discriminatory intent by direct evidence, plaintiff is not required to rely on inference of discrimination created by prima facie case of McDonnell Douglas: presumption is created that adverse employment action taken against plaintiff was product of that discriminatory intent and at that point burden shifts to employer to prove by a preponderance of evidence that adverse action would have been taken in absence of discriminatory motive. Perry v. Johnson Products Co., Inc., 698 F.2d 1138 (11th Cir. 1983).

In Burdine plaintiff argued that the District Court erred in failing to address her allegation that she was discriminated against on the basis of both race and sex. The Court of Appeals found that the District Court did

not properly address the issue of whether plaintiff made out a prima facie case under the four part McDonnell Douglas v. Green test nor did it make findings concerning the comparative qualifications of the plaintiff and the selectee. Relying on Burdine, Respondents must prove that those whom he hired were better qualified than the Petitioner. Since the District Court did not make specific factual findings on this issue, the court remanded for proper treatment of the issue based on the existing record. Jefferies, 615 F.2d 1025 (5th Cir. 1980).

In Webster plaintiff was a probationary public school teacher. The Court, citing Roth, noted that property interests are not created by the Constitution itself, but their dimensions are defined by existing rules or understandings (App. F) Adams v. McDougal, 695 F.2d 104 (11th Cir. 1982), and the term "contract," as used in Civil Rights Act [42 1981]. In Webster the District Court had dismissed plaintiff's allegations of discrimi-

nation. On appeal, Petitioner argued that Griggs and McDonnell applied. The court found that reinstating him as a teacher following his suspension showed lack of arbitrariness. Although plaintiff failed to make his case under both models, the 5th (11th) circuit afforded the opportunity to do so. Webster v. Redmond, 599 F.2d 793 (5th Cir. 1979). The Bishop groupthink syndrome, invoked by Respondents and mandated by the Courts, forclosed on Petitioner' FULL rights.

CONCLUSION

In view of the preponderance of discrimination law and the foregoing points and authorities, and the number of "protected group members" affected, the conclusion is inescapable that Petitioner presents a case in which conflicting decisions in important questions of constitutional and discrimination law should be resolved and the judgment against Petitioner overruled.

Respectfully Submitted,

Roland A. Jones

CERTIFICATE OF SERVICE

I certify that I have served 3 copies of the foregoing to counsel of record by hand on this 14 day of June, 1984.

Roland J. Jones